ANCIENT DOCUMENTS

RELATIVE TO THE

OLD GRIST-MILL,

WITH SOME

REMARKS

ON THE

OPINIONS

OF

MESSRS. HUNTER AND GREENE,

COUNSEL EMPLOYED BY THE TOWN TO EXAMINE THE SAME.

HERALD OFFICE.

1829.

its clearness and candor, and its comprehensive brevity, cannot but recommend it to those whose duty it is to contend with his clients.

The opinion of Mr. Greene is not so unobjectionable. But it becomes not me to condemn it; nevertheless I may be permitted to point out some of its most apparent errors.

It appears to me that Mr. Greene, in the outset, falls into a great error in supposing that the copy, granted by Shadrach Manton, in 1667, of the grant of 1646, was a "copy from the record." This was not the fact. Shadrach Manton did not certify it to be a true copy from the record; his certificate is only "copied this 4th of January, 1667," and this same certificate is attached to the "articles of agreement." Neither is certified to be a true copy from the record, nor is there a particle of evidence to show that either were ever recorded in the "Town's Book;" nor is there a particle of evidence that the grant of 1646, of the "valley," was ever made to John Smith, except from what may be gathered from the grant of 1673, which is recorded in that book. In this grant several returns are mentioned, and among them, one of "ten acres, more or less, at or about the place where the mill now standeth," which was made about the year 1647. This, no doubt, has reference to the grant of 1646, if it was made in that year. But is it not very singular indeed, if the articles of agreement of 1649 were on record in 1673, or had been deemed executed and binding, that mention should not have been made of them by the "men of Providence," in their grant of that year; for, let it be remembered, this was before the town was burnt, and the consequent destruction of many of the records. This was an open town-meeting; a great many returns were

brought in to be recorded, and among them the ten acres where the mill stood; and the very condition named, upon which the grant was made, viz. "for building a mill, as witness do testify," and moreover only six years after the copy of them had been made by Shadrach Manton, when the fact, if these articles of agreement had been binding and obligatory, must have been fresh in the minds of the proprietors—I say, therefore, is it not extremely singular that no mention should be made of them in their grant at that time, particularly by the witnesses present, who testified as to the building of the mill? The total absence of all this in that grant, is most conclusive evidence that in 1673 the articles of agreement were not deemed executed and binding. [This fact will also appear by other evidence, when I come to consider another point in the case.] For how natural it would have been, in referring to the "ten acres where the mill now standeth," to have also referred to the articles of agreement, as a *part of the original contract*, if such had been the fact.

But the grant by the "men of Providence," in 1673, proves conclusively another very important fact, although such proof might be inferred from other circumstances. It proves not only the condition upon which the grant was made, but shows, conclusively, that the condition had been performed by the Smiths; and hence, forever afterwards, the Smiths were to hold the granted premises "without let, hindrance or molestation." What other construction can be given to such sweeping words? The grant refers to the original survey, made by Chad Brown, about 1647, and the place where, to wit, "where the mill now standeth;" and, finally, for what it was made, to wit, for "building a mill." Here is the original grant, the

condition and performance all distinctly admitted, in language that cannot be misunderstood; nay not only admitted, but *proved*, for it seems witness were called to testify to the fact—hence the Smiths were to hold ever afterwards free from all conditions. The grant, therefore, of 1673, is not so much, properly speaking, an "enlargement" of the condition, as observed by Mr. Hunter, as it is *proof* that the condition had been performed; whether the one or the other, however, it is sufficient to show that there is, now, no condition attached to the premises.

It is true the articles of 1649, as "copied" by Shadrach Manton, in 1667, were recorded in the "State Book," by Richard Ward, recorder, but at whose request, or for what purpose, does not appear; but one thing is certain, it could not have been done in consequence of the law or order of 1644, as contended by Mr. Greene, for they were not recorded by Mr. Ward until about 1727, that is, 78 years after they appear to have been made, and 60 years after they were copied by Shadrach Manton; and because, in 1714, the General Assembly passed an act requiring "all deeds and conveyances of houses, lands, &c. to be registered in the *registry of the town* where such houses and lands do lie:" and by this act it was further provided, that, unless this was done, no deed or conveyance should be "good or effectual." The record, therefore, made by Richard Ward, who was not a town register, in 1727, was a mere nullity, binding upon no one. In point of fact, therefore, there is no legal record extant of the articles of agreement, and it is believed, for the best of all reasons, they were never executed, never deemed obligatory, and, therefore, never designed to be recorded *any where* by the original parties.

I will now venture to differ in another point from Mr. Greene. He seems to think that "sturdy farmers" are not to be bound by the rules of the common law; and, therefore, when they made a grant to John Smith, of land to "build a mill," it was intended that the mill should always be kept in repair, and relies on the "circumstances" of the times for this construction. Waiving for a moment the rules of the common law, in regard to the construction of "conditions," let us, as Mr. G. says, "consider the circumstances in which the parties were placed, and the object of the town" in making this grant.

This town was settled in 1636, by one hundred and one proprietors, among whom were, or came shortly afterwards, John Smith and his son John, and then the only mill-wrights in the colony.—John Smith, Sen. had already built his house in the "valley," on the banks of the Moshassuck river, and it might be with the view to improve the advantages of this stream, should inducements be offered. In 1646 or 47, the proprietors did offer the land in case he would "set up a mill."—The offer was accepted and the mill built. Now let us consider the value of the land and the value of a corn mill, at that time, and attempt an estimate of each. Let us see whether the building or setting it up, only, was not, under all circumstances, a full and adequate compensation for the grant.

What was ten acres of land, in 1646, worth—in the infancy of the colony and among the Indians—at a time, too, when, if history be correct, men were obliged to carry their fire-arms afield to their work, to defend themselves, not only against the beasts of the forest but the savage foe? At a period when scarcely a night passed but the Indian whoop awaked its slumbers, for even at that time the In-

dians had began to be affected with that deadly hatred to the English, which, in a few years after, broke into an exterminating war, nor ended in the conflagration of the whole town. In this calamity the town-clerk's house was burnt, but, as if a special providence then interfered for the benefit of the widow and fatherless of future generations, the "town book," which contains the important record of the grant of 1673, escaped the conflagration!—The record of this grant briefly tells the whole story of the mill, and, from that time to the present, it has literally been the "ark" containing the covenants of the parties. But to return. Under the circumstances attendant on the first settlement of the colony, I ask what were ten acres of land worth? A "few English shillings per acre?" No—not more than ten acres would now be worth in the wilds of Missouri, beyond the Rocky Mountains! But, on the other hand, what was a corn mill worth, to a hundred families who were obliged to pound their grain in mortars into meal? It was invaluable, and fearlessly I assert, that setting one up was an accommodation to the first settlers of more value, beyond all comparison, than the land given for that object. But, in addition to this, could it be expected, at that time, that any capitalist would be willing to invest his money in such an uncertain business; for it will not be pretended that the custom of a hundred families would of itself have been a sufficient inducement for any prudent individual to have built a mill? Hence the offer was made. The grant was made to Smith to induce him to *build* a mill, and never was intended to be shackled with a condition for such a paltry consideration, to keep the mill in repair. The very circumstances, upon which Mr. Greene relies, show this demonstratively to have been the fact.

But it is believed that no circumstances in a court of law will or can control *express* agreements or grants, whether made with "sturdy farmers" or others. In doubtful cases usage is admitted to explain, but where there is no ambiguity, never. In the construction, therefore, which is to be given to the grant of 1646, we must be governed, as in all similar cases, by the rules of the common law.—Now let us enquire what the common law is, at the same time admitting that there was a condition attached to the original grant.

It is a general rule of law, (Touchstone, p. 30,) that conditions attached to estates are to be construed strictly, and "shall not be extended beyond their *words*, unless in some special cases;" and yet, with regard to the grant of 1646, it is attempted to be shown by Mr. Greene, that the words "to build," are to be construed "to keep up," and that the words "to set up," signify "to keep in repair." Or, in other words, he attempts to convert what was a condition precedent into a condition subsequent; and, instead of making the estate to depend upon the condition *expressed* in the grant, without the least ambiguity, to depend upon a condition *not expressed*, which, indeed, could not be *implied*, from any words used in the grant, without murdering the King's English. (Reader, if you think this too strong language, look at the grants of 1646 and 1673, in the appendix, and judge for yourself.) And this, too, when it can be shown, when it is shown, under the circumstances of the case, that such a construction would have worked manifest injustice to the grantees. The condition attached to the original grant was a condition *precedent*, and, when it was performed, the estate was free; and so the "men of Providence" understood

it in 1673, when they confirmed the estate to John Smith, the son of the original grantee.

I have observed, that, in doubtful cases, usage may be admitted to explain; but, where there is no ambiguity in the original grant, never. Upon this point I adopt the principle laid down in Cortelyou vs. Van Brundt, (2d Johnson, 357.) The principle here decided is, "that evidence of usage is inadmissible to explain the language of a deed, not ambiguous or equivocal." I am willing to rest the whole cause upon this point, and submit the question, whether there is the least ambiguity in the language of the above-mentioned grants. Indeed, the words are so plain, simple and unequivocal, that it would much puzzle even a clear headed lawyer to make them appear doubtful. Other cases could be cited, but it seems superfluous to prove what must always be the conclusion of common sense. It is the office of usage to explain ambiguity, but never to control perspicuity. What is translucent admits of no explanation.

I will now notice another extraordinary position assumed by Mr. Greene. He advances a doctrine which, if true, would put an end to all mutual confidence. He observes—"Suppose the town had broken their part of the agreement, this could be no bar to the action against the Smiths, for a violation of their part of the agreement." For a moment waiving all objections to the agreement, and supposing it now to be valid, let us see what would be the condition of the parties if this doctrine were true. The town on their part agreed, 1st, that the Smiths should "have, hold and enjoy the said mill, with its rights and privileges, for their proper use and benefit;" 2d, "that the water course in said river shall not be stopped by us or our survivors.

whereby said mill shall be molested in its constant course;" 3d, "that no corn mill shall be built within the boundaries or limits of said plantation, to be authorized or allowed of by us, so long" as said mill should be kept up by the Smiths, &c. Now, if Mr. G's doctrine is correct, the town could have diverted the water from its course; for, at that time, they had the sovereign control of the river, and yet have sustained a suit against the Smiths for not keeping up the mill; or, in other words, the town could have deprived the Smiths of the means of keeping up the mill, and then been able to have sustained a suit against them for not keeping it up, and the only satisfaction the Smiths could have, would be to bring a suit against the town! According to Mr. Greene, it seems the instrument contained provisions for a *mutuality of lawsuits*, but no mutuality of covenants—a good doctrine for the profession, but death to the community! I ask any intelligent lawyer for any other correct legal inference.

But it is not true, as Mr. G. says, that "these covenants" in the instrument "are independent." If the instrument itself did not declare the fact, their very nature would show that they were mutual, and dependant on each other. It could not be understood that the town could divert the water course, allow other mills to be built, and even deprive them of all benefit and profit of the mill, and then be able to sustain a suit for not keeping it up.

But the articles of agreement themselves show, that these covenants were mutual, and so intended. The words of the agreement are—"We, the said town, together with the said Alice and John, do *mutually* agree and covenant, concerning the mill, as followeth." That there may be independent

covenants, I am willing to admit; but, certainly, no Court would ever decide those covenants to be independent which, from their very nature, ought to be mutual. The fact is, as justly observed by Mr. Hunter, "this agreement wants the essence of a contract, *reciprocity*." Though it might have been reciprocal once, it cannot be so now. Events, physical, moral and political, conspire to prevent it. It would be the height of injustice, as well as chimerical, for the town now to undertake to exact obedience to this agreement, when, as Mr. Greene himself would acknowledge, the Smiths could not exact obedience from the town *even if the town felt a willingness to obey*. It is beyond their power. It is not in the power of the town now to control the waters of the Moshassuck river: they parted with that power on the adoption of the charter. If there is any sovereignty that can now control them, it is the sovereignty of the State; and even so far as private interest is concerned, it is beyond the reach of this power to control them, without providing the means of remuneration.

I will now consider another objection to this agreement, growing out of the fact that it was *made* by administrators. This is equally fatal. An administrator has no authority to enter into covenants binding the heir. Upon what authority Mr. G. makes the assertion, that, at the period of this agreement, an administrator, as such, in Rhode-Island, could represent or have any control over the fee of the real estate of the intestate, I am at a loss to determine; yet this he is compelled to do in order to sustain the validity of this agreement.

I had always thought that Rhode-Island was, not only an English colony, its inhabitants subjects of the King of England, and owing allegiance to him, but that the laws of his realm were their laws, at

least during that period which preceded the charters. Such has been my understanding with regard to the laws, and such I believe the understanding, generally. Indeed, Mr. Greene himself virtually admits this, by making John Smith "heir at law" of his father. By what rule of descent was he heir at law, unless by the English? If I am correct, then, the laws which defined the duty and powers, and which were in force in England, respecting administrators, were in force in this colony. If this was not the fact, it is incumbent on Mr. G. to point out the difference. I have in vain, myself, looked for any order or law among the records of the monthly court meetings of the proprietors, anterior to the charter, altering the law of England in this respect, but have found NONE. But I have found a law that was passed at the *first session* of the General Assembly, after the charter of Charles, in March, 1663, and was the fifth in order that was passed,* entitled "an act for the probate of wills, and granting of administrations." This law gives the town-councils power, as judges of probate, "to take the probate of wills and testaments, and grant administrations, and all other matters relating thereto; and to act and to do, as, by the *laws of England* and of his Majesty's colony, doth belong to the said office." Now I ask, with this law before him, and in the absence of all others to contradict it, what intelligent lawyer would hazard his reputation by asserting, that the administrator "represented the fee?" And how Mr. Greene, with all his good sense, should be caught straggling in such a strange path in search after law—how he could advocate

*The first act regulated the elections; the second declared the rights and privileges; the third was to prevent clandestine purchases of the Indians; the fourth created a public seal of the colony.

a principle, which could not be tolerated a moment by any court, is to me unaccountable. Certainly Mr. Greene needs not to be told that the duties and powers of an administrator are clearly defined, and, when he transcends his *official* authority, his acts are as void as a judgment of a court transcending its jurisdiction. The administrator, by our laws, is merely a representative of the personal property; he cannot even receive the rents and profits of the real estate, much less bind the fee. Except under certain circumstances the law makes him an agent to sell it. An administrator in England (Godolphin, p. 118,) is an accountable commissioner, authorized by the appointment of the ordinary for the disposal of the goods of an intestate. He is the same in Rhode-Island, except as above mentioned. How, then, could such an officer encumber the heir's estate by covenants? I ask, where is the power given to the administrator to make that a trust estate in the heir, which was not so in the ancestor? And still more strange and absurd it would be, if he could attach a *condition* to the inheritance, inconsistent with the grant to the ancestor. The fact, that John Smith was the heir at law as well as administrator at the period of this agreement, cannot vary the result, as Mr. Greene supposes; for this agreement, if made at all, was made *as administrator*. It is binding, therefore, only so far forth as he had power as administrator; and if he and the widow, in their official capacity, had no power to bind the heir, then was their agreement null and void. It cannot be true that these administrators, *acting officially*, could unite the "rights of administrator and heir."—Upon this point I unite in opinion with Mr. Hunter, entirely.

But I come now to ask of Mr. Greene a solution

of a still more sturdy difficulty, with regard to this agreement. The argument is *in rem.* Whence the necessity of these articles of agreement at all, if the original grant was made upon the "condition" that the mill should always be kept in repair? Certainly such a condition, running always with the possession, would be the best guaranty to the town for that purpose; far better than any covenants. Can we suppose that the town could ask for better security than a condition, which would work a forfeiture of the mill itself, in case of its violation? Why, then, should the administrator be "assayed," time after time, to enter into this agreement? I venture to affirm, that common sense can give but one answer. It was because no such condition was attached to the original grant, and the "sturdy farmers" well knew it; and hence their endeavors to persuade the widow and her son to enter into this agreement, which would have the effect, in some measure, of such a condition. But it is needless to pursue this point, and I should not have said one half so much about this agreement, if Mr. Greene and the *gristmillites* in town had not relied so much upon it.—It was never executed, nor was it ever recorded; and the only evidence of its *existence*, is what purports to be a *copy*, which is found recorded in the "State Book," by Richard Ward, recorder; at a time when the record in that book of the *original agreement* itself, even if it had been duly executed, would have been null and void, so far forth as it affected the reality, it being then the law of the State, that all conveyances affecting real estate should be recorded in the "registry of the town," in which such lands were located.

Before, however, I dismiss this point, I must mention one other fact, which does appear of re-

cord, and which is equally conclusive against the validity of this agreement. I have observed that this agreement was never executed, but the fact which I will now mention will prove that it was REJECTED by Alice Smith. This is proved by a vote of the town, on the 10th of the 3d month, 1649. The vote is in these words:—"Upon the return of an answer from widow Smith, it is ordered, that Robert Williams, Thomas Joanes, Hugh Bewit and Gregory Dexter, shall once more assay to make an agreement with the said widow Smith, about former and latter motions and propositions about the mill, and prepare an answer by the next Court." The language of this vote is very particular, and full of meaning. The words are—upon the return of "*an answer*" the committee "*once more*," &c. This shows most conclusively that the widow had been once assayed, and had returned an answer that she refused her assent. Upon no other construction can you give any meaning to these words. It is indeed so plain, that the most sceptical *gristmillite*, it appears to me, cannot doubt. The committee were ordered to make a report at the next court. No report was made, and, from that day, this agreement lay unnoticed and almost unknown, buried in the rubbish of the town-clerk's office, until it was dug up by Shadrach Manton, and "coppied" in 1667. From that time it slept again until 1727, when it was recorded in the "State Book;" nor do we hear of it again until 1764, in the stormy political times of "Ward and Hopkins," when Elisha Brown, who was, or had been about that period, Lieutenant-Governor under Ward, and, of course, as unpopular in Providence as a tory of the Revolution, appeared, as large as life, in open town-meeting, and made promises which, in law, he was not bound to make, nor

which could be binding on the heir at law of his wife, in whom the fee was, even if they were on him, as I will now attempt to show.

Mr. Greene seems to think that the mill belonged to Elisha Brown, at that time, in fee, and, therefore, thinks it incredible that he would have then "charged his estate with a condition from which it was then free." Now, whatever Elisha Brown did, or intended to do, can have nothing to do with the point in dispute, for the best of all reasons—Elisha Brown, himself, had nothing to do with it; he was merely a life tenant of a part of the mill.—The fee was in his eldest son, the heir at law of his wife, then deceased, from whom the inheritance descended. Whatever acknowledgments he made, therefore, or whatever he promised to do in regard to the mill, was totally null and void, at least beyond his own interest. He could no more have charged the *fee* of the heir with his own act, than he could have transferred the title by his deed poll. But I will go further. The acts of Elisha Brown, in that town-meeting, would not have bound even his own estate, if, in point of law, it had not been bound before; and I am supported by the principle decided in More vs. Foley, (6 Vessey, Jr.) In this case it was maintained, that "it cannot be a legal mode of construction, that a party who has done an act which he is not bound to do, or from a mistake, should therefore be bound forever, without the power of retreating." Suppose Elisha Brown did, not only promise the town, but actually 'save the water for his mill,' thinking he was bound in law so to do. Is this mistake of the law forever to cut off all retreat, and forever to charge his estate with a condition, with which it was not chargable before? It cannot be pretended.

Equally mistaken is Mr. Greene in supposing

"a grist-mill has always been kept there, upon the ground of a claim of the town, and admitted by the Smiths." When did the *town* ever make a "claim" to that mill before? It is true that in 1649, ONE HUNDRED AND THIRTEEN YEARS BEFORE, the *proprietors* "assayed" to make an agreement with Alice Smith, but failed; but from that time to Elisha Brown's appearance in town-meeting, there is not a particle of evidence on record to show, that the town or proprietors ever made any claim. Indeed, the proprietors have never made any claim since they were repulsed by Alice Smith! It is true a grist-mill has always been kept there; but it can be demonstrated that it always has been for the interests of the proprietors to have one there: and I ask, how can that act be construed into an acquiescence which was for the interests of the parties to do. If there is any argument to be drawn from *acquiescence*, it ought to be shown that such acquiescence was *adverse* to such interests.—If A comes into my yard, and draws water from my well for twenty years, does it follow that my acquiescence deprives me of the control over the well? Can I not discontinue the well, if necessary to my estate? Can *such* an acquiescence be construed into the admission of claim? Of such a claim, too, as to deprive me of the power of my own well? That the inhabitants of the town had a right to carry their corn to mill, and to have it ground, I admit, *so long as a mill was there;* but where is the contract or law compelling the proprietors to keep a mill there for their accommodation, when it would have been for the interests of the proprietors to have removed it?

Nor is it true that the claim of the town has ever been admitted by the Smiths; they have uniformly denied it, from the days of Alice Smith, in 1649,

to the present hour, the promises of Elisha Brown being considered null and void, as to any binding effect upon the heir or owner. There is not a particle of evidence that any owner ever promised to do, or ever did any act by which the town could claim, or had a right in justice to claim, any control whatever over that mill. Their claim is wholly "in nubibus"—nor has it ever been seen except by Mr. Greene, and in some very extraordinary reports of the town's committees at various times, which, however, cannot affect the legal rights of the parties.

I now approach the most important question in the cause, at least as respects the right of the town; a question upon which Mr. Greene himself, with all his antiquarian knowledge, is candid enough to confess he entertains some doubt. Although he is very decided in every thing else, in direct opposition to Mr. Hunter; indeed, his whole opinion seems intended as an answer to Mr. Hunter, rather than a separate, judicial opinion, as was contemplated by the town: yet when he comes to the question, whether the town of Providence, in its corporate capacity, or the original proprietors of the Grand Purchase, have now this lien upon the mill estate, he confesses there is "some doubt upon the claim of the town." It seems rather an unfortunate circumstance that, after having taken so much pains to erect such a convenient edifice for the "sturdy farmers" of Rhode-Island, he should, all at once, just as the building was finished, with his own hands knock away the foundation upon which it stood. Yet such is the fact, as will now be shown.

Mr. Hunter's opinion upon this point is not only very clear and decisive, but it happens to be in perfect unison with the opinion of some of the most

able Counsel of Massachusetts, in strictly an analogous case, some of the facts of which I will mention.

Soon after the first settlement of the town of Wrentham, the original proprietors of that town before its incorporation by the General Court, made a grant to A of a mill privilege and a tract of land, "so long as he should keep up a grist-mill." It will be observed that these words are very different from those used in the grant to John Smith, although here it might be deemed doubtful whether the writ, *De Reparatione Facienda*, could be sustained. Under this grant A entered, and his heirs and assigns maintained a grist-mill until within a few years, when, under the influence of the American system, it was razed to the ground, and a cotton factory erected on its ruins. The town had a special town-meeting upon the subject, and passed a vote appointing a committee, instructing them to consult with counsel relative to the claim of the town. Some of the most able counsel in the State were consulted, who came to the conclusion, that the *town* could not enforce the contract. If it could be enforced at all, it must be done by the proprietors who were the grantors. Such was the decision of counsel in Massachusetts.

In Rhode-Island, the proprietary rights have been protected by a special law. The act of 1682 was enacted expressly for this purpose, and its provisions are as broad as the exigency of their case required. It legalized, under the provisions of the charter, the Indian title, and, consequently, all titles under that. The original proprietors and purchasers from the Indians in the several towns, and each and every of them, were quieted in their respective purchases: were also declared to be a distinct and separate body from the towns, and, as

such, authorized to appoint "all such officers as they should judge needful and convenient" for the transacting of their business: empowered to keep separate records, and, indeed, to a limited extent, they were in substance a body corporate, and had an individuality of corporate existence, as much so as the towns themselves. If so, I would ask, how could the rights of this body ever enure to the towns without a grant from them? By way of familiar illustration I might ask, how could the corpotion of the Merchants Bank enforce a contract made by A with the Providence Bank, unless authorized by express authority? Yet these two bodies are not more distinct in law than the bodies of the original proprietors and the towns. If, therefore, John Smith did make a contract with the proprietors, what is that to the *town?* By what authority can the town enforce that contract? What kind of action could be maintained? Can A recover damages for a breach of a covenant made between B and C? Where is the law of the State which makes these two distinct bodies but one?— Where is the act of *union*, since their divorcement and separate maintenance in 1682?

What defect there was in the Indian title, it is not necessary to enquire. If there was any, it was cured by the charter of Charles, or by the acts passed in pursuance of that charter. But, whether good or bad, the towns have nothing to do with it. They were no parties to those purchases; indeed, they had no legal existence at the time. In 1646 the town of Providence had no corporate existence. By what rule of law, then, can this town claim to be a party to a contract *made before its corporate birth?*

Nor will it mend the matter by saying the town is a trustee, a depositary of rights for the benefit of

its inhabitants. A trustee must be in existence at the time the trust is created, or the grant is void.—According to Mr. Greene's own showing, therefore, this contract was executed by John Smith with *no body;* for, at that time, there was no *legal* town. Indeed, his whole argument on this point resolves itself into this absurdity: In 1646 John Smith made a contract with Mr. *No-body*, trustee to *Every body;* hence *Every-body* has a right to look to *No-body* for execution of the trust! Que. Can *any body* derive much benefit from such a contract?

I come, now, to another part of the cause, growing out of the proceedings of the canal corporation. Allowing the town had an interest in the mill, anterior to the location of the canal, are they not concluded by their own acts since the location was made?

The Blackstone Canal charter was granted in June, 1823. The location of the canal through the old grist-mill, was returned to the November term of the Court of Common Pleas, 1825. Notice was immediately given to the owners, as well as to the town-treasurer and others concerned, to appear before the Court, pursuant to the provisions of the charter. The appraisers were appointed and commisioned; and, for the superintendence of the supposed interest of the town, a special town-meeting was called on the 2d of February, 1826. At this town-meeting a committee was appointed, who were clothed with discretionary powers to make any contract with the canal corporation, for remuneration, for damages sustained, or to release all damages at their discretion; and their acts, in the language of the vote, were to be "conclusive and valid." The committee elected to make a claim for damages, and they did so before ap-

praisers. They afterwards made a report of their doings to the town, and their report was accepted and the committee discharged. The appraisers awarded that the town had sustained no damage.

Now, I ask, what more the town can do or expect? They selected their own mode of procedure; pursued it to the end, and accepted the report of their committee: or, in other words, deliberately sanctioned what their committee had done. But should it be said that the location was an illegal one, let me ask if they are not *now* too late to make that enquiry? They have once submitted to the provisions of the charter, and have, therefore, waived their right to make this enquiry.—Suppose, for the sake of simple illustration, the appraisers had awarded the town one thousand dollars, and the town had received that sum from the canal company; how then would their case have appeared? Would they not *then* have been precluded? I ask, after they had *once* been paid, and that, too, by their OWN ELECTION, who would, nay who could suppose they could be entitled to a *second* payment, whether the location were legal or not? Now I ask whether the legal effect of the award of the appraisers, under the provisions of the charter, is not the same as if they had awarded a specific sum? The appraisers were authorized, under the provisions of the charter, to award such damages as they thought proper above the "benefits" received; but it seems they awarded, that, in this instance, the benefits to be received, in consequence of the canal, were paramount, or overbalanced the damages sustained by the town in consequence of the destruction of the mill. The town, therefore, have been *paid*, legally paid—as much so as if they had received a specific sum. But if they were dissatisfied with this payment, why not

pursue their remedy? Why discharge their committee? Why not order an appeal?

But aside from all this, the grossest injustice would now be done if the town could sustain an action against the proprietors. Let it be remembered, by the town's interfering the mill proprietors got nothing but nominal damage for themselves—(Mr. Greene is mistaken on this point)—and the reason why they received nothing, was principally predicated upon the supposition of the extinction of the town's claim. The appraisers *supposed* the town had a claim, but supposed that claim extinguished by the location; and hence, the *residue* of the estate of the mill owners, unincumbered, equal to the whole encumbered with it.

If the town had not interfered, but had permitted the mill owners to have gotten all the damage they were able, there would then, perhaps, have been more justice in calling upon these owners for their portion of those damages, at least so far as they could have been able to have made it appear they had an interest in the mill. But they interfered, and the consequence was, they not only got nothing themselves, but they prevented the mill owners from getting any thing. And I ask, what kind of justice, I put it to the conscience of every honest freeman, must that be, which would seek damage from these mill owners now? I ask any one to be so good as to point out the difference between *such* a course of conduct, and the oppressive course of that King, who, of old, required a portion of his subjects to make brick without allowing them straw. The town have deprived these mill proprietors of the *means* of making payment, and now they seek to obtain payment from them from a source where it is not to be had, unless unjustly extorted, and from sources to which the town

never pretended to have any claim? What more correct inference, I repeat it, can a conscience, loving justice and equity draw from such a course of conduct in the premises?

It will be observed, that the preceding remarks are made with reference to the supposition that the removal of the mill was an illegal act. I will now view the right of the town upon the supposition that the removal was legal. Upon the question, however, whether the location and removal were legal or not, I give no opinion. It is not necessary. Whether legal or not, the town have concluded, themselves. In support of the legality of the location it might be urged, however, that the charter of 1823 gives the company power to locate the canal in any place they may think "most convenient for said company." This location was made under this authority, and all the further proceedings before-mentioned had. In this charter there is no restricting power, and, of course, nothing but damages could be recovered. It would seem, therefore, that mills, as well as any thing else, were liable to removal; and, if so, it might seem difficult to escape the conclusion, that the location and removal of this mill was a legal act. What, then, becomes of the proprietors' right to the mill? It is taken away—and if their right is taken away, let the freemen ask themselves the simple question, whether the town's right is not taken away, also?

But the charter, as amended in January, 1826, says Mr. Greene, makes provision for the security of mills; but it ought to be observed, that the location and subsequent proceedings were had under the *first charter*. It is a question, therefore, to be determined, how far the provisions of the *amended* charter can have any retrospective effect, on pro

ceedings already had; or how far it can control the powers given to the corporation by the first charter. This is a question, and a nice one too, which may hereafter puzzle legal wit, should a case arise in which it might be necessary to go into its investigation. But it is a question with which the town of Providence have nothing to do in the present case. They have made *their* election, through their committee, to demand payment for the injury sustained, and the *accepted* report of their committee is as good to the canal corporation, as a receipt in full of a specific sum.

Suppose the town's committee had elected to have sold and quitclaimed all their right, title and interest in the grist-mill to the canal company, for a specific sum, and had actually received it. Could the town have had their money and grist-mill too? And pray, what is the difference between such a case and the present? The town have *accepted* of the damages awarded them. What else are they entitled to? It is true they had no *money*, nor had Mrs. Howell, but they received the same kind of payment which she and a hundred others have been obliged to receive and put up with, to wit, "benefits" resulting from the canal—a legal payment under the charter, however doubtful in the event.

But I am not disposed to pursue this subject any further; it does appear to me to be too plain for argument. Indeed, were I before a tribunal of justice, where bright and unclouded intellect directed its decisions, I should feel constrained to apologise for urging many points I have done in the preceding remarks, which are too well settled to be disturbed. But the subject is of too much importance to let pass unnoticed. The town have been urged to a prosecution of their claim—nay,

almost goaded into a law suit, to obtain what one of their own counsel has advised them does not belong to them. And from whom? From an antagonist as powerful as themselves? No—from a widow! who is struggling to defend the inheritance of her fathers; and who, in this struggle, must not only bear her own expenses, but her relative proportion of that of her antagonist. In such a struggle, defeat is death, and victory but little better; for, whether successful or not, the inheritance must be frittered away to bear the expense of both parties.

BENJ. COWELL.

Oct. 31, 1829.

ANCIENT DOCUMENTS.

At our Monthly Court Meeting, as also being warned according to order, the 1st of the 1st month, 1646 So called, it was agreed that John Smith shall have the valley wherein his house stands, in case he set up a mill, as also excepting sufficient highways

Copied the 4th January, 1667, pr Shadrach Manton, Town-Clerk. Registered pr Richard Ward, Recorder.

The above is a true copy, made and taken from the 54th page of the Book of Land Evidences, No 4, in the Secretary's Office. Witness, Henry Ward, Sec'ry

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Articles of Agreement made and concluded upon ye —— day of ——, A. D. 1649, between the inhabitants of the town of Providence, in the Narragansett Bay, in New-England, on the one part, and Alice Smith, widow, and John Smith, her son, administrators unto the estate of John Smith, miller, of the said Plantation, late deceased, on the other part, viz.:

Whereas the abovesaid deceased, of late in his livelihood, at his proper cost and charge, with the free grant and liberty of said town, built a water mill in the said Plantation, upon the river commonly called Moshausuck, for grinding the said inhabitants' corn, whereby he might comfortably enjoy the profits of his charge and labor, and the said town the use and benefit of said mill.

Now whereas the said Alice and John Smith, being lawful administrators unto the estate of the deceased, we, the said town, together with the said Alice and John Smith, do mutually agree and covenant concerning said mill, as followeth —1. First. The said town, for themselves and their survivors, do agree and covenant, that the said Alice and John Smith, their heirs, executors, administrators or assigns, shall have, hold, possess and enjoy the said mill, with its rights and privileges, for their proper use and benefit. 2. Secondly. That the water course of the said river shall not be stopped by us or our survivors, whereby the said mill shall in any way be molested in its constant course and proceedings 3. Thirdly That the sixteenth part of every bushel (with allowance for waste, according to the custom of the country) to be allowed for grinding 4. Fourthly That no corn mill shall be built within the boundaries or limits of the said plantation, to be authorized or allowed by us or our survivors to take toll, so long as the said Alice and John Smith, their heirs, executors, administrators or assigns, shall be able to maintain and uphold said mill—useful and sufficient at all seasonable times, (common accidents and casualties excepted,) for the grinding of all the corn that shall be needful for the inhabitants of the said plantation. 5. Fifthly. We, the said town, for ourselves and our survivors, do hereby give, grant and confirm, for the proper use, properly for the maintaining of the said mill, unto the said Alice and John Smith, their heirs, executors, administrators or assigns, that quantity of land that was formerly granted unto the aforesaid John Smith, deceased, as viz—One hundred and fifty acres, whereof fifteen acres meadow ground, with common proportionable. 6. Lastly. In consideration of the premises, we, the said Alice and John Smith, for our heirs, executors, administrators or assigns, do agree and covenant with the said town and their survivors, to maintain and uphold the said mill, serviceable and useful, suffi-

ciently and timely to grind the corn of the inhabitants of said town, according to the custom of other mills—and unto all and singular the said premises, we do hereby interchangeably put our hands the day and year above written.

Copied this 4th day of January, 1667, pr Shadrach Manton, Town-Clerk.—Registered pr Richard Ward, Recorder.

The preceding is a true copy, made from the 53d and 54th pages of the Book of Land Evidences, No. 4, in the Secretary's office. Witness, Henry Ward, Sec'ry.

Recorded from Mr. Secretary Ward's copies, this eighth day of Sept. A. D. 1786, pr Theodore Foster, Town-Clerk.

Page 145 of the transcribed records, 10th of 3d month, 1649. Upon the return of an answer from the widow Smith, it is ordered, that Robert Williams, Thomas Joanes, Hugh Bewit and Gregory Dexter, shall once more assay to make agreement with the said widow Smith, about former or latter notices and propositions about the mill, and to prepare an answer by the next Court.

Page 144. The third of ninth month, 1649. Thomas Olney is chosen moderator of this assembly. Agreed, that every 2d and 5th day of the week shall be grinding the corn of the town.

Page 140. 28th of 8th month, 1650. Thomas Olney and Gregory Dexter are chosen by the town to agree with two other men, that widow Smith and John Smith, her son, shall choose, touching the highway in the valley, and other articles of agreement about the land and mill.

Page 136. 27th of 11th month, '51. Ordered, that John Smith, the miller, shall have a six acre lot, which was William Barrows', by new Bridge, upon the mill account

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Page 143. The 6th of 3d month, 1650. Ordered, that Hugh Bewit shall issue the matter touching the Indians' demand for corn, and to capitulate with widow Smith about it, and see what she will give for her part, and what he pays to the Indians the town will pay to him.

ANCIENT GRANT.

At a town-meeting the 24th of May, 1673. Arthur Fenner, Moderator.—At which meeting a return of many of the 50 or 60 acres shares in the new division were brought to be recorded. The meeting is dissolved. The return of which lands here follow, according as they were brought; Arthur Fenner being chosen to lay them out by the town unto the inhabitants of the said town.

Laid out unto John Smith, Sen. about the year 1647, ten acres, more or less, at or about the place where the mill now standeth; six acres more or less of meadow, lying at the upper end of that which is called the great meadow, on the southwestard side of the river called Moshawsuck; six acres of meadow at the place commonly called Wainscote meadow, lying and being part of it on the south side, and part of it on the north side of the river. These parcels of land being laid out by Chad Browne, then Surveyor of the town of Providence, being in part of what was granted to him, as he was a purchaser, and for building a mill, as witness do testify.

Laid out unto John Smith, Jun son of the abovesaid John Smith, by the surveyors of the town of Providence. Arthur Fenner and Thomas Harris, six acres upon the neck, bounding southward with the land of John Jones and Shadrach Manton, on the northwesterly with a stompe, on the southesterly with a walnut tree; six acres more or less at the place commonly called New Bridge, on West river, bounded on the north with a six acre lot, which formerly was Joshua Winnsor's: on the south with the coman; on the west

with the coman; on the est with the coman, at the place commonly called Wainscott field; and thereabouts an hundred and fifty acres, more or less, laid out by the eighteen fotte polle; bounded southesterly with a tree marked on two sides: southwesterly with a chesnut tree; bounded on the northwesterly and northesterly with the land of John Brown, one acor, liing and being up the west river, being part of a share of meddow or low land, which was laid down by Robert Peck, all which parcels of land being part of what was granted by the town of Providence unto John Smith, Sen. and his sonne John Smith, both of them received purchasers in the town of Providence.

We, the men of Providence and purchasers of the said town of Providence, do own and acknowleg that all thes above mentioned parcles of land to be the true and lawful right of John Smith and his heirs, forever, with all appurtenances and commoities thereunto. To have and to hold without let, hindrance or mollestation

Voted and ordered to be entered in the town records. Enrolled the 8th May, 1673, pr me, John Smith, Clerk of the town of Providence.

Providence, Oct. 3, 1829.—The above and foregoing is a copy from an old Book of Records of the town of Providence, from page 127 and part from page 128. Witness, Nathan W Jackson, Town Clerk.

At a Town-Meeting held by adjournment, on Thursday, the 20th of September, 1764. Mr. Ephratm Bowen, moderator. Mr. Elisha Brown came into Town-Meeting, and engaged to put the mill on Moshawsuck river in good repair, and to do his endeavors to save water for the use of said mill, and to repair the same as soon as conveniently may be

Voted, that Daniel Jenckes, Esq. James Angell and George Jackson, be a committee to enquire into the custom of the toll that is usually taken in the colony, and to report to the town; which quantity of toll, when found, shall be the toll to be taken by Mr. Elisha Brown, at his grist-mill, agreeable to the original grant of setting up said mill.

At a Town-Meetng held at Providence, on Saturday, the 10th day of November, A. D. 1764. John Cole, moderator. The committtee appointed to settle the toll at Elisha Brown's mill, made their report in the following words, to wit:—Agreeable to the within appointment, we have met and examined the original grant, &c. and do report, that the said Elisha and John Brown shall have the fourteenth part of all the Indian corn ground at their mill, and the sixteenth part of rye, and the eighteenth part of wheat, as toll.

Providence, November 8, 1764.

N. B. Said Brown is to return 13 14ths of Indian, 15 16ths of rye, 17 18ths of wheat.

Daniel Jenckes,
James Angell,
George Jackson,
} Committee.

At a Town-Meeting, held 20th April, 1785. Whereas it is represented to this meeting, that the lower mill in the town of Providence is now out of repair, and that it is necessary some measures should be adopted by the town in order that the design of the original grant of the land for a mill, for the benefit of the town, may be duly answered.

It is, therefore, voted and resolved, that Mr. Samuel Thurber, Jr. Major Charles Keene and Mr. Job Smith, be a committee to enquire on what terms the original grant was made, and how the present possessors hold the land where the said mill is erected, and to report the same, together with their opinion of what is proper to be done by the town respecting the same; and in case that they shall find it incumbent on the present owners of said mill to repair the same, that the committee request them to do it without delay.

N. B. This committee made no report.

At a Town-Meeting held August 25th, 1801. Resolved, that James Burrill, Jr. Samuel W. Bridgham and Ephraim Bowen, Jr. be and they hereby are appointed a Committee for the purpose of inspecting into the state of the mill, near the mill bridge, so called, and to investigate the tenure by which said mill is held by the present proprietors of the same—and that said committee make report at the next town-meeting.

There is no report of this committee on record.

At a Town-Meeting of the freemen of the town of Providence, legally warned and assembled at the town-house, on the twenty-eighth day of August, being the last Tuesday in this month, (1821.) John Carlile, Esq. moderator. Voted, that Moses Brown, Samuel Eddy, Samuel W. Bridgham, Thomas Burgess and John Howland be a committee to enquire into the right, interest or concern the town has in the grist-mill and its privileges, situated in that part of the town called Charlestown. That they examine all grants and contracts respecting the said mill and privileges; and also that they ascertain by what authority those in possession of the premises exact and receive more toll for grinding than is customary in other mills in the State, and make report to the next town-meeting.

N. B. This committee made a report, signed by three of their number.—The committee say, sickness in the family of Mr. Eddy, and the absence of Mr. Bridgham from town, prevented their attendance with the committee.

At a Town-Meeting of the town of Providence, legally warned and assembled at the town-house, on Thursday, the 2d day of February, A. D. 1826.

Whereas the Corporation of the Blackstone Canal have surveyed the proposed route or passage of the canal, so as to cross the site of the grist-mill, in which the town have an interest, and also to extend through other lands claimed by the town. It is, therefore, voted and resolved, that Philip Allen, John Carlile and Benjamin Clifford be a committee to confer with the Canal Commissioners, or with any other persons appointed, or who may be appointed, to appraise the damages sustained by proprietors of land through which the said canal may pass; and to superintend the interests of the town before the Commissioners, or before any persons appointed to make appraisal as aforesaid, or before a jury in case the said committee shall claim an appeal; and that they have authority to contract, in behalf of this town, for such remuneration for injury or damage which the town may sustain in the premises, or at their discretion to release the same, as to said committee shall appear just and reasonable: and any contract, so made by said committee, shall be conclusive and valid. A true copy:

Witness, Nathan W. Jackson, Town-Clerk.

At a Town-Meeting of the freemen of the town of Providence, legally warned and assembled at the town-house, on Wednesday, the nineteenth day of April, A. D. 1826.

The committee, appointed in February last to confer with the Canal Commissioners, or with any persons appointed or may be appointed to appraise the damage sustained by proprietors of land through which said canal may pass, report, verbally, that they have attended to the duties of their appointment, but are not yet ready to make further report. A true copy.

Nathan W. Jackson, Town-Clerk.

At a Town-Meeting of the freemen of the town of Providence, holden by adjournment, on Saturday, the 10th day of June, A. D. 1826.

The committee, appointed by the town in January last, to represent the claims of the town to the Commissioners, appointed by the Court of Common Pleas, make report as follows:

The committee, appointed by the town of Providence in January last, to

represent the claim of the town to the Commissioners, appointed by the Court of Common Pleas for appraising land over which the Blackstone Canal may be laid, respectfully report, they have attended to the duties of their appointment, and have claimed damages for the injury the town may receive by the removal or destruction of the corn mill, at the Moshawsuck river, in which the town have an interest.

It appears, by the records of the Court of Common Pleas, the committee, appointed by said Court, do not consider the town of Providence will sustain any injury by the removal or destruction of the corn mill, and award no damages to the town.

PHILIP ALLEN,
JOHN CARLILE,
BENJ. CLIFFORD, } Committee.

Providence, June 5, 1829.

And the said report having been read, it is voted and resolved, that the same be received and recorded. A true copy:

Witness, NATHAN W. JACKSON, Town-Clerk.